(1) Supreme Court, U.S.
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No. 00 867

IN THE

Supreme Court of the United States

CLARA CLARK,
Pro se Petitioner,

v.

RODNEY SLATER, *et al*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the attorneys for the respondents violate petitioner's right to due process per the Fifth Amendment when, repeatedly in their motions for summary judgment to dismiss her lawsuit for discrimination in employment, they made false criminal accusations against her, without giving her a *Miranda* warning or ascertaining that she was represented by an attorney, that resulted in both lower courts ruling against her request for a jury trial?

RULES 29.6 AND 14.1 STATEMENT

Because petitioner and respondents are government employees, a rule 29.6 statement is not required.

Per rule 14.1:

The petitioner is:

Dr. Clara Clark, an employee of the U.S. Coast Guard, an agency of the U.S. Department of Transportation.

The respondents are:

The Honorable Rodney Slater, Secretary of the U.S. Department of Transportation, the umbrella agency of the Coast Guard.

The Honorable Janet Reno, Attorney General, U.S. Department of Justice.

The Honorable Ida L. Castro, Chairperson, Equal Employment Opportunity Commission

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PETITION FOR A WRIT OF CERTIORARI

I, Dr. Clara Clark, *pro se* petitioner, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

DECISIONS BELOW

The decision of the Court of Appeals was to dismiss CA 00-5243 on 26-SEP-00 on the grounds that the District Court's decision was not final. The decision of the District Court for the District of Columbia was to dismiss the entire action CA 95-1683 EGS on 05-MAY-00 as futile for failure to state a claim after seven attempts to amend the pleadings.

JURISDICTION

The decision of the court of appeals was entered on 26-SEP-00. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) where Congress provided that this Court may review cases in the federal courts of appeals by "writ of certiorari granted by a petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The district court of the District of Columbia has jurisdiction pursuant to:

(a) Title VII of the Civil Rights Act of 1964, 42 U.S.C.A § 2000e *et seq.* This Act proscribes discrimination in employment because of race, color, religion, sex, and national origin.

(b) The Age Discrimination in Employment Act of 1967, 29 U.S.C.A § 621 *et seq.* This Act proscribes discrimination against individuals over age 40.

(c) The Rehabilitation Act, 29 U.S.C.A. §§ 706, 791-794, which is limited to government employers, recipients of federal financial assistance, and federal contractors. This Act prohibits discrimination against individuals with physical or mental handicaps.

Venue lies in the district court because of the following:

(a) The petitioner is employed by one of the respondents (the Coast Guard of the U.S. Department of Transportation) in the District of Columbia.

(b) The decisions affecting petitioner were made in the District of Columbia.

STATEMENT

I, Dr. Clara Clark, *pro se* petitioner, on or about September 1995, filed a lawsuit in district court against the Coast Guard (CG). This lawsuit is for illegal discrimination in employment that started in 1989, with a charge of Hispanic national origin against Ms. Norma Bullock, the then Civil Rights Officer for Headquarters, and continues until today. Since 1989, in retaliation, the CG has maintained a hostile environment characterized by various forms of illegal discrimination (e.g., age, sex, handicap, and sexual harassment) and by penalizing me for working while rewarding similarly situated government employees for not working.

The hostility includes false criminal accusations against me, by respondents' attorneys, in their numerous motions for summary judgment to dismiss my lawsuit, while threatening that my failure to properly respond would result in my admitting to the crimes. In doing so, they were supposed to, but did not, give me the *Miranda* warning or ascertained that I had the representation of an attorney. Quite the opposite, they knew that I could no longer afford one (due to their colleagues' lengthening unnecessarily the 1994 hearing of my

complaints which caused me to exhaust all my savings in legal fees.)

The hostility also includes the attorneys' taking advantage of my lack of subtle knowledge of English, for being a native Spanish speaker, to confuse me. For example, in one of their cleverly worded proposed orders, the attorneys conveyed simultaneously two opposite meanings: that the decision was final and that it wasn't.

The attorneys' intention was to deceive the court to win either way: if I had not appealed, they would have argued that I lost, otherwise, my case would remain in district court while I continue to be the subject of their hostility that already caused me two physical handicaps that damaged my future employment. I timely appealed, and the court of appeals ruled on 26-SEP-00 that the district court's decision was not appealable for not being final.

I petition this review on the basis that the court of appeals made an error of law by ruling in favor of the deceiving attorneys since, obviously, a valid reason cannot be true and false at the same time.

I ask this Court to review and remand my case to the district court for jury trial, without further delay, because doing otherwise would be unjust and expose me to serious danger. I urge this Court to hear me in my name, and that of other native Spanish speakers in similar situation, because the probability that one of us can articulate a case like this is almost zero. Even now, it was the attorneys' ignorance about computers that led me to uncover their plot but, when similarly ill-intentioned attorneys become proficient in computers, the injustice will go on to infinity.

BACKGROUND

I, Dr. Clara Clark, *pro se*, a computer specialist of the U.S. Coast Guard Headquarters since 1987 and a computer

specialist of the U.S. Department of Energy during 1983-1987, am doing an excellent job per admission of my employer. My duties include working in teams on security, performance, acquisition, and software development of computer systems. My accomplishments include receiving a doctorate in 1992 with a dissertation on instructing the computer to understand Spanish, and awards for: authoring the best technical publication in 1987, being the honor student at the Office of Personnel Management's Executive Seminar in 1988, delivering the key-note speech during the week of Hispanic heritage celebration at the Coast Guard in 1988, and participating in the multi-billion dollar procurement of computer equipment by the Armed Forces in 1992.

On April 1989, I complained of Hispanic national origin discrimination against Ms. Norma Bullock, the then Civil Rights Officer of the U.S. Coast Guard Headquarters (CG) for replying, to my declining her offer of collateral duty as Hispanic Employment Program Manager for Headquarters, in a manner that made me look as a disloyal employee in front of my supervisors then Lieutenant Commander (LCDR) Brad Balch (1st line), then Commander (CDR) Bill Fels (2nd line) and then CDR Gregory Cope (former 2nd line). Ms. Bullock damaged me in my future employment in that, from my personnel file, prospective employers would perceive me as disloyal.

Admiral (then Captain) William Donnell, Ms. Bullock's supervisor at the time, settled the complaint informally on 16-MAY-89 by offering to destroy all related memoranda. Through his testimony at the 1994 hearing of my complaints, I learned that he had no intentions to live up to his part of the agreement since he kept the set of the memoranda that I had given him when I discussed the problem at his office. I also learned that Mr. Ben Bandy, the Equal Employment Opportunity (EEO) counselor with the Inspector General of the Department of Transportation who handled the case, did

not fulfill his part of the bargain either since he submitted at the hearing a set of the memoranda that he was supposed to have destroyed. Later, at the 1994 hearing of my complaints, CG's attorney then Lieutenant (LT) Steven Poulin, instructed Admiral Donnell and Ms. Bullock to lie by saying that the reason for my dispute with Ms. Bullock was about my wishing to teach Spanish which they claimed was not allowed.

On or about October 1989, at the request of Ms. Maxine Schremp, LCDR Brad Balch, tasked me with conducting a study of the performance of the VAX computer. In doing this work, my first contact was Mr. Mark Polanskas, the on-site contractor responsible for the operation of the VAX. He informed me that Ms. Mary Robey (a government employee) monopolized the computer by starting several processes and keeping them active for a month at a time with the result that other users experienced slow response. He also informed me that Ms. Robey read novels during working hours. Subsequently, I verified this information by contacting other users and by witnessing Ms. Robey reading the novels while charging the government overtime for producing reports at night. I asked Mr. Mark Polanskas to provide me with a print out of the system statistics to document this behavior of Ms. Robey but he refused saying that she was his girl-friend. I reported this to LCDR Balch but he did not say anything or allow me to write this incident in the final report.

On or about October 1989 also, CDR Fels, my second line supervisor, denied me (age 49) training for managers that he authorized for Ms. Carmen Colon (age 32) who also was a Hispanic female GS-13 computer specialist in my division. On or about October 1989, CDR Cope announced at an all hands meeting that he had reorganized our branches into the new division of "Information Management", approved by the Chief of Staff whose deputy at the time was Admiral Donnell. This division was comprised of three new branches of which,

the "Policies and Procedures" one, was going to be headed by Ms. Colon at a higher grade.

On May 1990, the reorganization took effect and I became acting chief of the Operations Section under Ms. Maxine Schremp while Ms. Colon became acting chief of the Policies and Procedures Branch. Among the twelve employees under my supervision were Mr. Mark Polanskas (who by that time was a government employee) and Ms. Mary Robey. During June, I was very busy directing the recovery of the computers that were malfunctioning often due to excessive heat. But, in the midst of the turmoil, I noticed that these two employees were having 2-hour luncheons on a daily basis with my supervisor and that Mr. Polanskas was buying and bringing Ms. Schremp food as waiters do. Neither Mr. Polanskas nor Ms. Robey turned in a leave slip to me for these absences. Worse yet, they were not available for work that I needed them to do, so I ended up doing their work. The other two young employees who had regular extended luncheons with Ms. Shremp were Ms. Carmen Colon and Ms. Karen Casey (Bell at the time). Later, in 1993, as the person responsible for recommending employees for awards, Ms. Casey was instrumental in Ms. Polly Blum's receiving a Quality Performance award for "keeping jars full of candy, baking cakes, and brewing and serving coffee to all in the office without asking for any contributions". I was never recommended for an award nor I was one of the "all" that Ms. Casey mentioned.

On or about July 1990, when CDR William Chang reported as the new Deputy Division Chief and CAPT Kenneth Ervin as the new Division Chief, Ms. Schremp took me to their office where, at closed doors, they yelled at me for hours. I took notes that captured his words saying that the luncheons were OK.

On or about August 1990, CDR William Chang designed five quality ranking factors (QRF's) and organized an

interview panel to fill the Chief of Policies and Procedures vacancy. CDR Chang had an age bias that showed when he tailored QRK # 2 to the work that young Ms. Colon was doing. CDR Chang also had a technical bias, which he exhibited openly, in that he preferred technical (computer related) over non-technical staff. The fact that his age bias dominated over his technical bias showed when he referred Mr. Spangerberg (a technician) and young Ms. Colon to CAPT Ervin for selection, even though in his opinion (by his testimony at the 1994 hearing) I was technical and Ms. Colon wasn't. On 04-SEP-90, CAPT Ervin selected Ms. Colon because, by his testimony at the 1994 hearing, the position was not a technical one and Ms. Colon was a "known quantity".

During May to October, 1990, when I was under the supervision of Ms. Maxine Schremp, I did not have a position description (PD) or critical job elements (CJE's) as required by Coast Guard regulations. Ms. Schremp claimed that I didn't do the job she assigned me to do. I compiled a 143-page document showing that I did not only do one but multiple sets of PD's and CJE's that Ms. Schremp never looked at. On or about November 1992, I submitted copy of this document to Mr. Houston (Jerry) Jones, the person who replaced Ms. Bullock as Civil Rights Officer, at his request. Later, in statements to EEO counselors and at the 1994 hearing, Ms. Schremp testified, after the fact, that she was very dissatisfied with my work.

On or about October, 1990, CAPT Ervin demoted me to a technical job, transferred me away from operations to systems development, and CDR William Fels became my 2nd line supervisor again. CAPT Ervin also gave my job to Mr. Polanskas in retaliation for my complaints about the luncheons and for what he believed was my spying on Ms. Schremp relative to her $6,000.00 leave abuse that the

Department of Transportation's Inspector General determined on my tip.

It was not until February, 1991, that CDR Fels formalized CJE's for me. This left only two months during the evaluation year (April 1990 to March 1991) but a minimum of three are required. So, he shorted me one month of the subsequent year and formalized CJE's for Feb-April, 1991. My main task during the Feb-April period was to convert two databases of the Division of Investigations, which contained information about marine casualties, using a tool called XPONENT. The vendor of this product claimed that after things were set up correctly, the tool would do the conversion in about two hours. On 28-APR-91, two days before the evaluation period ended, my supervisors changed my task to do the conversion using another tool called PROGRESS. Later, on or about June 1991, CDR Fels gave me a below-average evaluation for the year April 1990 to March 1991, saying that I did not "produce results" for not having completed the conversion.

On or about 01-MAY-91, my supervisors gave me 60 days to do the conversion. I completed the job seven days later (by July 7th) due to their fault of crashing a disk that required reconstruction. Later, at the 1994 hearing, my supervisors testified that their reason for such rush to shut down the Wang computer was to save money. At the same hearing, the testimony of another witness conflicted with theirs by pointing to evidence that the Wang was not retired until several years later.

On or about July 1991, LCDR (by this time CDR) Brad Balch became my supervisor again (this time 2nd-line) and LCDR Dave Wilder my 1st line supervisor. On or about October 1991, I received a copy of the investigative report on my EEO complaints (IR 91-62). Fearing that, if I don't exercise my rights when I should I may be found to have waved them, I reviewed it as thoroughly as possible. In doing

so, I noticed that Ms. Colon had received a high rating on one of her CJE's about her work in a technical evaluation board (TEB) of which I was also a member. Since the rating praised her contributions but I did not see her doing any thing, I called Mr. Dennis Coleman, who was a chairperson during part of the time that the TEB was in effect, to find out his basis for the rating and asked him if he would testify at my hearing. He agreed with me that she did not contribute much to the TEB but said that he was not willing to testify because she was his friend.

On or about November 1991, Mr. Houston (Jerry) Jones, the new Civil Rights Officer who replaced Ms. Bullock, called me and wanted to meet with me to hear my version. After we met, he asked me if I would be willing to withdraw complaint No. 4. I said that I would consider it if he changed "withdraw" to "stop". When I went back to his office, he showed me the document while covering most of it with his hand and pointing to the word: "remove". To me, "remove" was a synonym for "withdrawal" not for "stop". So, I tried to get the document from his hand to write the change that I wanted. When I finally succeeded, I read that I was agreeing to withdraw all my complaints, not just No. 4, for nothing. I indicated to him that I wanted to consult an attorney and left his office with a copy of the unsigned document. In the investigative report of my complaint against him for his harassment, there was an affidavit by Ms. Chenita Edmonds, his secretary, to the effect that she witnessed how Mr. Jones was forcing me to sign with the words: "Come on Clara, sign so that we can go home."

On January 1992, I began a temporary assignment in Boston representing the CG (with two other individuals) in a multi-billion dollar procurement of computer equipment by the Armed Forces. When I stopped by my office on or about February to submit some travel vouchers, LCDR Wilder gave me my mid-term evaluation (he did not formalize CJE's until

November 26, 1991 so that February was about half the period ending in March 31st). He also gave me a letter of reprimand, cleverly labeled "Letter of Counseling" to make it look a lot milder than it actually was, for asking Mr. Coleman about Ms. Colon's evaluation. At the 1994 hearing, LCDR Wilder presented a copy of this letter from the files and testified that he did not intend to give it to me, that I stole it. At the time of giving me the evaluation for the period April 1991 to March 1992, CDR Balch and LCDR Wilder rated me average claiming that my work for the conversion did not count because it occurred before the CJE's were signed in November. A letter of commendation for my work in Boston was also average to them.

By the Fall of 1992, I realized that regardless of my outstanding work, my supervisors were going to continue devaluing my work and rewarding my co-workers for not working, on the basis of the work that I did for them. On or about the early part of 1993, I began to experience a constant feeling of nausea that was diagnosed as esophagitis (excess acid backing up onto the esophagus) by Dr. Suresh Malhotra who is a specialist in Gastroenterology. During the reminder of 1993, I exhausted my sick and annual leave reserves and I filed for disability retirement, thinking that it was the end of my working career. My supervisor at the time, who was LCDR Keith Grant, signed my request. This request was denied because he said that, although I was absent often, I was meeting essential duties.

During November 1993 to January 1994, the administrative hearing of my complaints was held. At that time, the Coast Guard's representatives, attorneys LT Steven Poulin and Andrew Pessin, instructed the witnesses to lie under oath, which caused lengthy cross-examinations by my attorney Ms. Francine Weiss of Kalijarvi and Chuzi of Washington DC to determine if the evidence had been tainted to the point that I could not meet the burden of proof.

The 1994 hearing was also unnecessarily lengthened by attorney Arthur Colby, the Equal Employment Opportunity Commission (EEOC)'s administrative judge through questioning CDR (by this time CAPT) Cope, to test the soundness of their plot against me. In particular, judge Colby wanted to reconcile the discrepancy that CAPT Cope wrote to Ms. Bullock saying that I was one of the most dedicated employees he had ever known, yet he testified being dissatisfied with my performance after the fact.

Judge Colby also lengthened my hearing when he denied the testimony of Ms. Peggy Long (who saw me all "beat up" after the yelling meetings with CAPT Ervin, CAPT Chang and Ms. Schremp) but admitted the testimony of Mr. Dennis Coleman who claimed that I disclosed to him Privacy Act information about Ms. Colon without her consent (by saying that I told him that she received an "outstanding" rating for the CJE on the technical evaluation board.) I proved that Mr. Coleman's testimony was a lie since Ms. Colon's performance evaluation clearly says that she received an "exceptional or level 4" not "outstanding or level 5" rating for that CJE. Mr. Coleman knew that it was a lie but, to sound convincing, he said that I was more his friend than Ms. Colon (because he had seen me outside the office) to convey the false idea that he placed duty to justice before friendship.

On or about June 1994, LCDR Wilder (by this time CDR) and LCDR Grant, my 2nd and 1st supervisors respectively, rated me low claiming that I missed deadlines. I complained of discrimination on the basis of my newly acquired handicap and showed that, but for my esophagitis, I would not have missed deadlines. In support of my complaint, I showed that, during that same year, in spite of their being late on assignments similar to mine, they received Quality Performance awards. I also showed that they were not physically handicapped for being active military.

My damages are that the AXID that I take to control my esophagitis (i.e., to keep the red sores in my esophagus from turning cancerous), causes me some sleepiness that interferes with my ability to drive safely. In turn, driving to the client's place of business is a common duty in my line of work.

On or about July 1995, Ms. Schremp in cooperation with CDR Scott Bair and LT William Butler deleted my title of "Dr." from the CG's computer system while keeping that of Dr. Harry Hantzes alleging that they were enforcing a commandant's instruction that did not allow civilian titles.

I showed them the authorization that I had from CAPT Chiswell, but they did not listen to me. CDR Bair and LT Butler did this because they enjoy seeing women in a lower capacity. For example, back in 1988 when CDR Bair worked in my area, he would constantly talk bad about his wife and how stupid she was. LT Butler, in turn, was enjoying that with the same e-mail he was making two women look bad (i.e., Lieutenant Junior Grade (LTJG) Elizabeth Becker and me). In particular, he was commending LTJG Becker for being a footservant to a male co-worker. He also was showing everybody in the division that I must have done something wrong because I no longer had a title. As for Ms. Schremp's motive, as seen above, she was mad at me for a lot of reasons some of which deal with her $6,000.00 leave abuse and the fact that she had to repay the money that she had already spent.

On 06-AUG-96, LT Butler and Ms. Colon were showing people at work some photographs that he had taken the previous weekend during the Latino Festival in D.C. All were laughing in a manner that sounded to me like ridiculing Hispanics. I complained of sexual harassment – hostile environment. During the EEO investigation, LT Butler submitted a set of the photographs, which showed him embracing different women, like people normally would offer

merchandise for sale. I complained that, by association, my co-workers would think that I too was for sale.

On 05-MAR-98, CDR Richard Kelly, Chief of General Law for the CG, assigned attorney Warren Dixon to handle my complaint on the basis of sexual harassment at that stage of the administrative process. In the previous months, Mr. Dixon had handled my complaint on the basis of my physical handicap, and I had pointed out to the EEOC's administrative judge that he had made a motion for summary judgment in bad faith. Among other things, at that time, Mr. Dixon wanted the administrative judge to believe that I was going to complain against him claiming that I had complained against every attorney that have represented the respondents. I pointed out to the administrative judge that the laws of the United States deal with facts not speculations that something may happen in the future. Mr. Dixon also had been harassing me with actions such as disobeying the administrative judge's order that granted the parties 15 days to respond to discovery requests, and demanding that I reply within 7 days claiming that I had a post office box to take undue advantage of the system. The fact that I explained to him, that the reason why I had a post office was to avoid statute of limitations problems, did not change his mind.

On 05-MAR-98, armed with his new assignment, Mr. Dixon notified me that he was going to take my deposition "from day to day until finished." As I read his letter while riding with my husband to work, I felt that his request was unreasonable since this was only one complaint and a previous deposition on multiple complaints took only one day. I felt so much anxiety thinking that it was going to be a series of yelling sessions like those with CAPT Ervin, CDR Chang and Ms. Schremp, that I broke my knee as I got off the car in front of the building where I work. I had an operation, have not been able to climb stairs any more, and my regular

means of transportation to go to work (i.e., walking) was impaired.

On November 1991, Ms. Lois Garin, Acting Chief of the Division of Systems Support, did not go directly into business without addressing me in any way as she could have at my suggestion several times before. Rather, whenever I approached her, which was always in connection with work, she would address me by first name repeatedly in front of her staff. When I asked her why she replied: "I forget". Since people would normally forget to do something and not the other way around, I complained to Ms. Linda Synowczynski, the CG's EEO counselor. In words of substance, I said that Ms. Garin was treating me like a stupid Hispanic who does not understand that she wanted me to OK the hostile environment she was making for me. Ms. Synowczynski did not make any efforts to settle the matter informally but wanted me to go to her office and receive the notice of final interview right then. Later, at the Department of Transportation's Civil Rights Office, Ms. Tami Wright (Gray on or about 1989), the former assistant to Ms. Bullock who delivered the offer of collateral duty to LCDR Balch in 1989, and who now holds the position of regional director, warned me that I had too many complaints on the subject of my academic title. It should be noted that, in her text, the "too many" is equal to two. This concludes the background and brings me to the argument of this petition.

ARGUMENT

I ask this Court to believe that I have not had my day in court, concerning a valid claim for illegal discrimination against my employer that I filed in district court in 1995, because respondents' attorneys Diane Sullivan, Mark Nagle and Wilma Lewis (SNL) of the U.S. Department of Justice have successfully deceived the district and appeals courts into denying me that right, through false criminal accusations

against me in their summary judgment motions, without giving me a *Miranda* warning or ascertaining that I was represented by an attorney. The evidence to substantiate the above assertions follows:

Valid claim.

The proof that I have a valid claim, at least as the age discrimination complaint for non-promotion that I filed in 1995 is concerned, rests on the facts that: (a) the district judge believed so, as of 22-JAN-98, when he denied respondents' motion for summary judgment and granted discovery; (b) during discovery I obtained documents that strengthened my case; (c) after discovery, focusing on my age complaint, respondents' attorneys moved for summary judgment on 12-APR-99 claiming that I could not show intentional discrimination under the ADEA; and (d) on my 19-JUL-99's opposition to their motion, I showed the intention that they claimed I could not show through evidence that I obtained during discovery.

The facts are:

The claims before the district court's order of 22-JAN-98 included an age discrimination complaint. The claims were:

> 1. On 01-SEP-95, at the time of filing my lawsuit identified in the district court's docket as [1], I included a complaint of age discrimination. Per admission of party opponent, it was for not being promoted to a GM-14 position, app. "G", App., *infra*, p. 11. Concerning this age discrimination claim, I was complaining, among other things, that Ms. Colon (the selectee) did not qualify for the position because she did not meet the 1-yr specialized experience in Policies and Procedures that party opponent admitted it was required, lines 5-10, para. 2, app. "H", App. *infra*, p. 12. A reason she did not qualify was that in Ms. Colon's performance evaluation from 1 April

1989 to 31 March 1990, job element # 3 about participating in a technical evaluation board (TEB) did not call for any work on policies and procedures; yet, her supervisor rated her high for her alleged work on policies and procedures on the basis of information that he did not witness since TEB work is a confidential procurement process, para. 1 and 2, App. *infra*, p. 24. Another reason is that I had been complaining that, when I was a member of the TEB under the leadership of Mr. Dennis Coleman, I did not see Ms. Colon contributing anything, last two para., p. 22, first para., p. 23, App. *infra*.

2. On 25-FEB-97, I made a motion to amend the pleadings identified in the district court's docket as [20]. It was to include the charges of harassment on the part of Ms. Schremp and of sex discrimination on the part of CDR Bair and LT Butler, all under Title VII. Excerpts are in app. "L", App., *infra*, pp. 29-32.

The claims after the district court's order of 22-JAN-98 did not include an age discrimination complaint. The claims were:

3. On 12-APR-99 my motion to amend the pleadings to include a charge of harassment under Title VII on the part of CDR Scott Bair in retaliation for complaining against him on the basis of sex discrimination (identified in the district court's docket as [53].)

4. On 16-OCT-99 my motion to amend the pleadings to include a charge of discrimination on the basis of a physical handicap under the Rehabilitation Act against CDR Wilder and CDR Grant (identified in the district court's docket as [69].)

5. On 10-NOV-99 my motion to amend the pleadings to include a charge of harassment under Title VII on the part of attorneys Warren Dixon and CDR Richard

Kelly in retaliation for my EEO complaints (identified in the district court's docket as [70].)

6. On 22-NOV-99 my motion to amend the pleadings to include a charge of sexual harassment under Title VII on the part of Ms. Colon and LT Butler (identified in the district court's docket as [72].)

7. On 16-MAR-00 my motion to amend the pleadings to include charges of Hispanic national origin discrimination under Title VII on the part of Ms. Garin, and retaliation under title VII on the part of Ms. Wright and Ms. Synowczynski (identified in the district court's docket as [83].)

The district judge believed that I had a valid claim when, on 22-JAN-98, he denied respondents' motion for summary judgment and granted discovery.

On 22-JAN-98, the district judge denied defendant's motions identified as [9-1] [9-2] and [28-1] for summary judgment or to dismiss my claims, and ordered that discovery be completed by no later than June 1, 1998, app. "D", App., *infra*, pp. 6-7.

During discovery I obtained documents that strengthened my case.

The evidence that I obtained through discovery was a copy of the proceedings of the Ms. Ollie Jones' hearing at the Merit System Protection Board when, under oath, Ms. Colon testified under the guidance of Coast Guard's attorney Andrew Pessin, that her supervisor (CDR Chang) would tear up her requests for leave because he knew that she had been working long hours as Acting Chief of the Policies and Procedures Branch and that she was not going to be compensated for those. Then, Ms. Colon testified that whatever she was doing, it was not working on Policies and Procedures, app. "H", App., *infra*, pp. 12-18. This evidence

strengthens my case since as mentioned *supra* there was a genuine issue for trial in that I had contested the alleged work that Ms. Colon did on policies and procedures as a member of the technical evaluation board (TEB).

After discovery, respondents' attorneys moved for summary judgment claiming that I could not prove intentional discrimination under ADEA.

After discovery, concerning my age complaint, in their motion for summary judgment of 12-APR-99, the attorneys only contested that I could not prove intentional discrimination under ADEA, app. "F", App., *infra*, p. 10.

On my 19-JUL-99's opposition to their motion, I showed the intention that they claimed I could not show through evidence that I obtained during discovery.

I showed respondents' intention to discriminate against me on the basis of age by the fact that, per Ms. Colon's testimony *supra* from discovery, they appointed her as Acting Chief of the Policies and Procedures Branch, prior to filling the vacancy, for the sole purpose of giving her the experience that they required as qualification for the GM-14 position. The appointment is shown when Ms. Colon answered "yes" to Mr. Nelson's question during cross-examination "... August, September of 1990... when you were acting branch chief, and then in September when you were promoted to permanent branch chief, correct?", first cross-exam question and answer, App., *infra*, p.16.

I also showed their intention to discriminate by the fact that respondents created a branch of Policies and Procedures that they did not need. This is because, per Ms. Colon's testimony, the long hours that she worked were not on Policies and Procedures (3rd answer on redirect, App., *infra*, p.18) and someone would have missed the work that was not being done, if it had been needed at all.

Now that I have shown genuine issues for trial at least for my age discrimination complaint, my next step is to show that respondents' attorneys deceived both lower courts to keep my complaint from going to trial.

Respondents' attorneys deceived both lower courts.

SNL drafted a proposed order, which the district judge signed on 05-MAY-00 without any changes, app. "B", App., *infra*, p. 3. It said that the district court was dismissing my complaints as futile (*ibid*, line 2, 2nd para.) after seven motions to amend the pleadings. In so doing, the district judge was essentially saying that, if I had tried unsuccessfully to cure defects in the pleadings for seven consecutive times, it was futile to keep on trying. However, as shown above, my six (not seven) motions to amend the pleadings were not to cure defects but to add claims of discrimination that had been exhausting the administrative remedies one at a time.

The court of appeals was also deceived because the attorneys' proposed order was ambiguous in that it conveyed simultaneously two opposite meanings: that the decision was final and that it wasn't. Final because the district judge stated that he considered the entire action on my last of seven motions to amend the pleadings (*ibid*, 1st para.) that included all my claims, not just the last one. Not final because the district judge, at a later time but still during the appeal, granted me that motion at the same time that he disregarded my request to disqualify respondents' attorneys for having become witnesses, app. "C", 3rd para., App., *infra*, p. 4.

Criminal accusations.

Although both lower courts may have detected the ambiguity in SNL' motions (and ambiguity is resolved against the party who drafts the document), they did not rule in my favor for having been persuaded by SNL that I was a

criminal. In particular, SNL accused me of the following four crimes:

(a) Stealing the letter of reprimand that LCDR Wilder testified he did not intend to give me. In SNL's exact words: "Yet somehow plaintiff obtained a copy of that counseling document", last 3 lines, 3rd para., App., *infra*, p. 25. Theft or conversion of government property is a crime per Title 18 U.S. Code 641, punishable to 10 yrs. if value is more than $100, 1 yr. if not.

(b) Stealing Ms. Colon's performance evaluation. In SNL's exact words: "Plaintiff's misconduct in obtaining a copy of Ms. Colon's performance evaluation", lines 4-5, p. 19, App., *infra*.. This is a crime as shown in (a) above.

(c) Accessing the Coast Guard's computer system in an unauthorized manner to give myself a title. In SNL's exact words: "Plaintiff admitted that she initiated insertion of the title "Dr." into her name in the Coast Guard E-mail directory", lines 8-9, last para., p. 20, App., *infra*. This is a crime per the Computer Fraud and Abuse Act, Title 18 U.S. Code 1030(a)(3) that is considered a misdemeanor for the 1st time and a felony punishable from 1 to 10 yr. for the 2nd time.

(d) Disclosing to Mr. Dennis Coleman, that Ms. Colon received an "outstanding" or "level 5" rating in her performance evaluation prior to competing for the promotion, without Ms. Colon's consent, last answer., p. 23, App., *infra*. In SNL's exact words: "plaintiff was handed a letter of counseling for plaintiff's inappropriate inquiries into protected and confidential personnel information regarding Ms. Colon", lines 2-4, 2nd para., p. 19, App., *infra*. This is a misdemeanor

per the Privacy Act (PA), 5 U.S.C. § 552a (1994 & Supp. IV 1998). A prosecution enforcing the PA's criminal penalties provision, 5 U.S.C. § 552a (i) would properly be filed against an individual who is a citizen of the United States per 5 U.S.C. § 552a (a) (2). In *Sullivan v. United States Postal Service*, 944 F. Supp. 191, 196 (W.D.N.Y. 1996) the court found that disclosure to job applicant's employer that applicant had applied for employment with Postal Service constituted disclosure of "record" under PA, although no other information was disclosed from application, rejecting Postal Service's attempt to distinguish between disclosing fact of records' existence and disclosing information contained in record, as applicant's name was part of information contained and Postal Service disclosed that a particular applicant by that name had applied for employment.

SNL by-passed due process.

In the motion for summary that SNL accused me of the crimes above, app. "N", App., *infra*, pp. 34-36, there was a warning to the effect that any statement made by them that I would fail to counter would be found by the court to have been admitted by me. In SNL's exact words: "... will be accepted by the Court as true unless plaintiff submits her own declaration or other documentary evidence contradicting the assertions made therein", footnote 1, lines 4-6, p. 35, App., *infra*. Given that this means that I could lose liberty or property (e.g., my income) or could even be deported and would not see my husband again, SNL were required to follow due process.

Per the Fifth Amendment to the U.S. Constitution, which applies to the federal government, "No person shall... be deprived of life, liberty or property, without due process of law." This Court has said, in *Board of Regents v. Roth*, 408 U.S. 564, 570 that liberty for due process purpose denotes

"not merely freedom from body restraint but also the right of the individual to contract, to engage in any of the common occupations of life... and generally to enjoy those privileges long recognized... as essential to the pursuit of happiness by free men". In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court concluded that it is necessary to use protective devices which include the now famous *Miranda* warning to inform suspects in custody that they "have the right to remain silent... have the right to consult with a lawyer and have the lawyer present during interrogation..."

SNL did not give me a *Miranda* warning or ascertained that I had attorney representation. In fact they knew I didn't. This is because attorneys Poulin and Pessin, in cooperation with the administrative judge attorney Arthur Colby, lengthen unnecessarily the 1994 hearing with interrogatories on collateral matters to their witnesses, such as questioning Mr. Coleman about my violation of the Privacy Act (alleging that I disclosed to him that Ms. Colon had received an outstanding rating) and not about discrimination, numeral (d) under heading "Criminal accusations", *supra* and app. "Q", App., *infra,* pp. 49-51. This required lengthy cross-examinations by Ms. Weiss, my attorney, which exhausted my savings. The estimate of legal fees for representing me at the district court level is somewhere between twenty to fifty thousand dollars. Although I have continued saving, I do not have near that much and I need these savings to pay for expert witnesses testimony.

False accusations.

At this point, SNL do not even survive the *prima facie* case that they violated my rights to keep me from having my day in court at all cost. This is because per *McCleskey v. Kemp,* 481 U.S. 279 at 297 (1987) a legitimate and unchallenged explanation for accusing me of the crimes above would be needed and that is something they do not have. In my reply to their motion, I showed that:

(a) On my 19-JUL-99 opposition, I pointed out to SNL that I did not steal the letter of reprimand because, at the 1994 hearing, I presented the original letter that LCDR Wilder gave me, app. "K", App., *infra*, p. 28. There, I mentioned to SNL that stealing is by definition taking property from others, not from oneself.

(b) On my 19-JUL-99 opposition, I pointed out to SNL that I did not steal a copy of Ms. Colon's performance evaluation because the investigative report (IR 91-62) showed, in its table of contents, both a letter by the DOT's Civil Rights officer saying that it was mine to keep, and the alleged stolen copy, last para. p. 25, pp. 26-27, App., *infra*.

(c) On my 25-FEB-97 motion to amend the pleadings, I showed evidence that I did not give myself a title in the Coast Guard's computer system because I showed authorization by CAPT Chiswell who was the same authority over the Commandant's instruction that CDR Bair claimed he was enforcing, App., *infra*, pp. 30-32 and app M, App. *infra*, p.33

(d) On my 29-JAN-96 opposition, I included evidence that I did not disclose to Mr. Coleman that Ms. Colon received an outstanding (level 5) rating, for the critical job element relative to her participation in the technical evaluation board, because the IR says that she received an exceptional (level 4) rating, 2nd para., App., *infra*, p. 24.

Willful deception.

SNL had every intention to harm me because, even though I pointed it out to them, that they had evidence on their hand, that their criminal accusations against me were false, they did not withdraw their accusations. Worse yet, they did so with malice by taking advantage of my lack of subtle knowledge

of English to strengthen their deception. For example, in words of substance, when they said that I managed to get my title in the computer, they meant that CAPT Chiswell did not have authority to override the Commandant's instruction. I began to fear that, in spite of the evidence, SNL were going to succeed in their bogus claim. As a last resort, I decided to analyze the evidence again and again thinking, figuratively, that "I was going to go down fighting". Finally, I realized that I have not said the magic words: that CAPT Chiswell and the Commandant's instruction were one and the same authority because the "TTM" symbol on the "from" line, App., *infra*, p. 31, is the same "TTM" symbol of the sponsor of "5270.1B" which identifies "Management of Electronic Mail", last para., App., *infra*, p. 32. In other words, SNL knew that they were wrong and knew that I had pointed to the evidence that would prove them wrong, but were confident that I would never be able to figure out what was wrong with my reply.

SNL had learned from Ms. Bullock, who had experience working with Hispanics as the Civil Rights Officer for the Coast Guard Headquarters, about my ignorance of subtle knowledge of English for being a native Spanish speaker, app. O, App., *infra*, pp. 38-42. In particular, Ms. Bullock completely re-wrote my speech for the week of Hispanic celebration at the Coast Guard Headquarters in Sep, 1988, para. 5, pp. 45-46, App., *infra*. SNL and their colleagues at the Coast Guard, DOT and EEOC, have retaliated against me all these years trying to cover up for the fact that Ms. Bullock, who was paid with tax-payers money to help me be the Hispanic Employment Program Manager for the Coast Guard Headquarters, did not help me. Worse yet, Ms. Bullock falsely accused me of saying "strong words" to her, numeral 5, App., *infra*, p.41.

Adverse effect.

SNL of DOJ and other attorneys before them, aided by their colleagues at DOT and EEOC, have managed to keep my case from going to trial without justification. Their tactics have cost me money plus practically all my weekends and free time for the past five years. This Court, on the basis of the evidence of their malice in this case, can imagine what is going to be like for me to go back to the district court for more hostility without hope of my case ever going to trial. As bad as it sounds, I will continue fighting with miraculous strength because the alternative will be that, although innocent, I would be forced to admit before the district judge having committed one or more crimes (which would be the equivalent of committing suicide.)

REMEDY SOUGHT

I ask this Court to reverse the decision of the court of appeals that sent back my case to the district court for more hostility and deception by respondents' attorneys and, instead, remand my case to the district court for jury trial, without further delay. I also ask this Court that, if there is anything that I may be entitled to but have not asked, please do the best for me.

REASONS FOR GRANTING THE PETITION

I urge this Court to grant my petition because of the injustice that this case has shown to me and to Hispanics in general. Although there are no statistics that could be compiled to tell us how frequent this type of injustice happens to Hispanics, there is something very clear in front of our eyes: the attorneys for the three agencies involved (i.e., DOT, DOJ and EEOC) showed no fear of being caught and executed their part of the plot to perfection. Since, the number of Hispanics working for these agencies would

reasonably be proportionate to their number in the total population, we are talking about an unknown but big number.

Another reason for granting my petition is to prevent further damage to this country if these attorneys are not stopped. This is because, although the probability that a Hispanic in similar situation could articulate a case like this is almost zero, their feeling of being treated unfairly would likely remain with, and spread among, them. In turn, this unfairness would likely reflect in lower revenues to this Country in today's world economy through the Internet.

CONCLUSION

I have shown that, at least as age discrimination is concerned, I have a valid claim with genuine issues for jury trial. I also have shown that respondents' attorneys have interfered with my case going to trial until today, when I proved that their blocking tactics to win at all cost against me included by-passing due process. I have asked this Court to reverse the decision of the court of appeals, remand this case to the district court for jury trial, and do all it can for me for the sake of justice. And, on the grounds that it would hurt the economy of this Country, I also have asked this Court to stop these attorneys from similar practices in the future against Hispanics in general.

Respectfully submitted,

Dr. Clara Clark
Pro se petitioner
P.O. Box 44553
Washington, DC 20026-4553
(202) 267-0355

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed On: SEP 26 2000]

No. 00-5243

September Term, 2000

95cv01683

CLARA CLARK,

Appellant,

v.

RODNEY SLATER, SECRETARY,
DEPARTMENT OF TRANSPORTATION,

Appellee

Before: EDWARDS, *Chief Judge*; GINSBURG and TATEL, *Circuit Judges*

ORDER

Upon consideration of this court's order to show cause filed July 5, 2000, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed. Neither the order filed May 5, 2000, nor the order filed June

27, 2000, is a final decision of the district court appealable under 28 U.S.C. § 1291.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

PER CURIAM

/s/ (Illegible initials)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed MAY 5 2000]

C.A. No. 95-1683 (EGS)

DR. CLARA CLARK,

Plaintiff,

v.

RODNEY SLATER,
SECRETARY OF TRANSPORTATION, *et al.*,

Defendants.

ORDER

UPON CONSIDERATION of Defendants' Opposition to Plaintiff's Seventh Motion to Amend Her Complaint, filed on March 16, 2000, and the entire record herein, it is this 4th day of May 2000 hereby

ORDERED, that the plaintiff's motion to amend the complaint filed March 16, 2000 is denied as futile, because it fails to state a claim upon which relief may be granted.

/s/ Emmet G. Sullivan (illegible)
EMMET G. SULLIVAN
United States District Judge

cc:
Diane M. Sullivan
Judiciary Center Building
555 4th Street, N.W. Rm. 10-122
Washington, D.C. 20001

Dr. Clara Clark
P.O. Box 44553
Washington, D.C. 20026

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed JUN 27 2000]

C.A. No. 95-1683 (EGS)

DR. CLARA CLARK,

Plaintiff,

v.

RODNEY SLATER,
SECRETARY OF TRANSPORTATION, *et al.*,

Defendants.

[91-1], [83], [67-1]

ORDER

Upon consideration of plaintiff's motion to vacate [91-1] this Court's May 4, 2000 order denying plaintiff's motion to amend her complaint, it is hereby

ORDERED that this Court's May 4, 2000 order is VACATED and plaintiff's motion to amend her complaint [83] is GRANTED; and it is further

ORDERED that plaintiff's motion to disqualify defendant's attorneys Diane M. Sullivan, Mark E. Nagle and Wilma A. Lewis [67-1] is DENIED; and it is further

ORDERED that defendant shall have until July 21, 2000 to supplement its motion to dismiss or, in the alternative, for summary judgment in light of the amended complaint; and it is further

ORDERED that this case is referred to U.S. Magistrate Judge John M. Facciola, pursuant to LCVR 72.3, for a report and recommendation on defendant's pending motion to dismiss or, in the alternative, for summary judgment [82].

SO ORDERED.

/s/ Emmet G. Sullivan (illegible)
EMMET G. SULLIVAN
United States District Judge

DATED: 6/26/00

Notice to:

Dr. Clara Clark
P.O. Box 44553
Washington, D.C. 20026

Diane M. Sullivan
Judiciary Center Building
555 4th St, NW Rm.10-122
Washington, D.C. 20001

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed JAN 22 1998]

C.A. No. 95-1683 (EGS)

DR. CLARA CLARK,

Plaintiff,

v.

RODNEY SLATER,
SECRETARY OF TRANSPORTATION, *et al.*,

Defendants.

ORDER

Upon consideration of defendant's motion to dismiss the original and amended complaints and/or for summary judgment, and the responses and replies thereto, and liberally construing the plaintiff's *pro se* pleadings, as the Court must do at this juncture (see *Haines v. Kerner,* 404 U.S. 519 (1972); *Sweat v. United States Navy,* 683 F.2d 420, 424 (D.C. Cir. 1982), it is

ORDERED that defendant's motions [9-1] [9-2] [28-1] are DENIED WITHOUT PREJUDICE to further consideration upon the completion of discovery; and it is further

ORDERED that all discovery must be completed by no later than June 1, 1998; and it is further

ORDERED that a status hearing is scheduled before the Court on June 16, 1998 at 10:00 a.m. to discuss further proceedings.

/s/ Emmet G. Sullivan (illegible)
EMMET G. SULLIVAN
United States District Judge

DATED: 1/22/98

Notice to:

Dr. Clara Clark
P.O. Box 44553
Washington, D.C. 20026

Lisa MacPhee, Esq.
Assistant US Attorney
Judiciary Center Building
555 Fourth St, NW,10th Flr
Washington, D.C. 20001

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed JAN 14 2000]

C.A. No. 95-1683 (EGS)

DR. CLARA CLARK,

Plaintiff,

v.

FREDERICO PENA,
SECRETARY OF TRANSPORTATION, *et al.*,

Defendants.

ORDER

Upon consideration of plaintiff's motions to amend her complaint [69] [70] [72], the defendant's response thereto, and pursuant to the hearing held January 11, 2000, it is hereby

ORDERED that plaintiff's motions to amend are GRANTED and that the defendant shall have until February 15, 2000 to file potentially dispositive motions to the amended complaint; and it is further

ORDERED that the defendant's earlier motion to dismiss or for summary judgment [50], which had been referred to U.S. Magistrate Judge John M. Facciola pursuant to Local Rule 504 for a report and recommendation, is hereby DENIED AS MOOT.

SO ORDERED.

/s/ Emmet G. Sullivan (illegible)
EMMET G. SULLIVAN
United States District Judge

DATED: 1/14/00

Notice to:

Dr. Clara Clark
P.O. Box 44553
Washington, D.C. 20026

Diane M. Sullivan
Judiciary Center Building
555 4th St, NW Rm.10-122
Washington, D.C. 20001

APPENDIX F

On line 19, page 35, of defendant's memorandum of 12-APR-99 in support of their motion to dismiss in part, or in the alternative motion for summary judgment, defendants stated:

Plaintiff can present no evidence of intentional discrimination under the ADEA regarding her non-selection to the GM-14 management position, ...

APPENDIX G

On lines 4-5, page 16, of defendant's memorandum of 12-APR-99 in support of their motion to dismiss in part, or in the alternative motion for summary judgment, defendants stated:

"Plaintiff cannot establish that age was a factor in her non-selection for a GM-14 position." And, on line 9, page 31, *ibid* "... Quite simply, plaintiff was not selected because she was not among the two top candidates in any of the five Quality Ranking Factors. AJ Transcript at 1146, lines 4 and 16 (Two candidates stood apart, Ms. Colon and Mr. Spangerberg)."

APPENDIX H

On paragraph B.2.1.3.5 of my 19-JUL-99's opposition to defendant's motion of 12-APR-99, I countered defendant's articulation of their reasons for the discriminatory actions of age discrimination as follows:

B.2.1.3.5 That Ms. Colon was best qualified.

Defendant articulates that the panel members found Ms. Colon best qualified (see footnote 8, page 31, defendant's memorandum). However, Ms. Colon did not qualify for the GM-14 because she did not meet the 1 yr. specialized experience, that defendant admitted was required, "managing policies and procedures." As defendant put it: "The position was not highly technical, and the Coast Guard was looking at the applicants for management of policies and procedures: to do an AIS plan.." (see defendant's memorandum, p. 28, lines 17-21).

... Ms. Colon's testimony, in 1995, at the Ollie Jones' hearing (reproduced in exhibit 24, this response) was that, while serving as acting chief of the policies and procedures branch (from May-1990 to September-1990) and permanent chief (afterwards), she worked long hours (for which she was remunerated by her supervisor, CDR Chang, by tearing up her requests for leave to compensate her for work that otherwise she would not have been compensated for), and none of this work was on policies and procedures.

Excerpts of petitioner's Exhibit 24

PETITIONER'S DISCOVERY REQUEST

Post marked Apr 15, 98 Rec'd Apr 21, 98, (petitioner's handwritten note of day of receipt.)

App. 13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed JUN 27, 2000]

C.A. No. 95-1683 (EGS)

DR. CLARA CLARK,

Plaintiff,

v.

RODNEY SLATER,
SECRETARY OF TRANSPORTATION, *et al.*,

Defendants.

[91-1], [83], [67-1]

ORDER

DEFENDANT'S RESPONSE TO PLAINTIFF'S *REQUEST FOR PRODUCTION OF DOCUMENTS*

Defendant Rodney E. Slater, Secretary of the Department of Transportation, responds to plaintiff's request for production of documents as follows:

Request for Documents 1: Copy of the entire testimony by all witnesses who testified at the *Ollie Jones v. Federico Pena, Secretary of Transportation* (hearing) on 22- MAY-95, before Administrative Law Judge Elizabeth Bogle, is attached.

Respectfully submitted,

/s/ Wilma A. Lewis, DC Bar 358637
WILMA A. LEWIS
United States Attorney

/s/ Lisa H. MacPhee

LISA H. MACPHEE, GA Bar # 352008
Special Assistant U.S. Attorney
Judiciary Center Building
555 4th St. N.W.
Washington, D.C. 20001
(202) 307-0268

Of counsel:
Matthew J. Glomb, Lieutenant Commander
U.S. Coast Guard, Staff Attorney
Office of Claims and Litigation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 1998, a true and correct copy of the above and foregoing Defendant United States Response to Plaintiff's Request for Production of Documents was served by mail, first class, postage prepaid to:

Dr. Clara Clark
P.O. Box 44553
Washington, D.C. 20026-4553

/s/ (illegible)
Lisa H. MacPhee
Special Assistant U. S. Attorney

U.S. MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, D.C. REGIONAL OFFICE

Docket No.
DC-0752-94-0027-G-1

OLLIE M. JONES,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Agency.

Merit System Protection Board
Room No. 1
Falls Church, Virginia

Monday, May 22, 1995

THE HEARING in the above-entitled matter commenced at 10:50 a.m., pursuant to notice.

Before:

ADMINISTRATIVE JUDGE ELIZABETH BOGLE

APPEARANCES:

On behalf of
the Appellant:

Nate Nelson, Esq.
AFGE
80 F Street, N.W.
Washington, D.C. 20001

On behalf of
the Agency:

Andrew S. Pessin, Esq.
U.S. Coast Guard
General Law Division
2100 2nd Street, S.W.
Washington, D.C. 20593

CONTENTS

WITNESSES:	Direct	Cross	Redirect	Recross
For the Appellant:				
Ollie M. Jones 10	14	27	28	
Margaret K. Long	31	37	52	54
Clara Clark 57	61	66		
For the Agency:				
Carmen E. Colon	72	97	105	
Maxine E. Schremp	111	131	138	139

EXCERPTS OF TESTIMONY:

CROSS EXAMINATION BY MR. NELSON:

Q:... If you had to go out of the office, let's say – and again, the time frame I'm talking about is 1990, specifically August, September of 1990. So that would have been when you were acting branch chief, and then in September when you were promoted to permanent branch chief, correct?

A: (by Ms. Colon) Yes. (see pp. 89-90)

Q: Have you ever been accused of claiming leave when, in fact, you were at work or off duty?

A: Not other than during this investigation, which I was able to prove that I was at work or I had requested leave. (see p. 93)

Q: Ms. Colon, what is the standard practice at your agency for applying for leave?

MR. PESSIN: Objection. Ms. Colon can speak to the leave procedures for her branch. I don't know that she can speak for the entire Coast Guard.

MR NELSON: I think I was talking about her branch. I was specifying for your branch, and I will clarify the question:

Q: Is it normal for employees just to fill out a leave slip, turn it in and take off, or do they wait until after a supervisor

or someone says it's approved or not approved? What is the normal procedure at your branch?

A: In my branch specifically, I request that my employees submit a leave slip and I return it to them.

Q: Is the same true for supervisors such as yourself?

A: It depends on the supervisor. They all have different procedures that they follow.

Q: But don't you have a leave policy you're supposed to follow as far as requesting leave?

A: ... Yes, I have it. This has not been in use since – this was done according to this year, August 23, 1990.

Q: It was not in effect prior to October of 1990. Is that your testimony?

A: That's what I would say, yes.

Q: Did the Coast Guard, your branch, have a leave policy prior to October 1990 as to how employees and supervisors should apply for leave?

A: Not an official policy in writing, no.

Q: Isn't it possible that they may have had one, and you was not aware of it?

A: Considering the division was created in May of 1990, at the time that this was published, it would have been the first time that any policy have been written regarding how to request... (pp. 97-99).

Q: Wouldn't you normally follow the regs of the Coast Guard?

A: Directives of the Coast Guard further interpreted by the offices and further interpreted by the divisions. So in general, we would say that, yes, we do follow the directives of the Coast Guard.

Q: Okay.

A: But you do – they vary depending on the office and the division how they are interpreted.

Q: Unless you do a variation interpreting the policy, then isn't it correct that you would normally follow their directive unless it's modified from office to office or branch to branch?

A: Yes. (see p. 100)

REDIRECT BY MR. PESSIN:

Q: ... You testified just a few minutes ago, when you were being questioned by Mr. Nelson, that there might have been an occasion when you were authorized by your supervisor to take leave and not submit a leave slip; is that correct?

A: Well, when I would submit a leave slip, he would just – tore the leave slip and allow me to take the leave without charging my time and attendance.

Q: That was Commander Chang? You said your supervisor. Was that Commander Chang?

A: Right.

Q: Why did he do that?

A: Because he knew of the long hours that I was not being compensated for. (see pp. 106-107)

A: ... when I submit the leave slip, I did not get leave slips back unless they were not approved. That was the procedure of Commander Chang at the time. We were to assume that the leave slip had been approved unless he return it to us. So, I would not have a copy of I would not have the leave slip unless it was not approved (pp. 101-102).

BY MR. NELSON:

A: ... I can say that I have taken time off where I have been authorized by my supervisor, and no leave slips were signed.

Q: Is that proper procedure? Whenever an employee take annual, sick or compensatory leave, isn't there supposed to be some type of leave record to [illegible]icate that?

A: It depends on the supervisor. Some supervisors, if you submit your leave slip and they decide that you have been working extra hours, they will just not use the leave slip.

Q: But isn't that improper? (pp. 102-103).

APPENDIX I

On lines 23-25, page 34, of defendant's memorandum of 12-APR-99 in support of their motion to dismiss in part, or in the alternative motion for summary judgment, defendants stated: "Plaintiff's misconduct in obtaining a copy of Ms. Colon's performance evaluation, and in making inquiries about her work performance, justified formal, non-punitive counseling in 1992."

On statement of material facts No. 8, p. 5, *ibid* respondents' attorneys stated:

In July, 1991, plaintiff was given a new supervisor, and in February, 1992, plaintiff was handed a letter of counseling for plaintiff's inappropriate inquiries into protected and confidential personnel information regarding Ms. Colon. Initial and Amended complaints at ¶¶ 42; Clark November 5, 1993 deposition at 279, line 17. Plaintiff admitted that the letter of counseling issued by Commander Wilder was a result of plaintiff's inquiries into the performance evaluation of Ms. Colon. Clark June 10, 1998 deposition at 140, line 18; Clark May 4, 1998 deposition at 154, line 13. Plaintiff initiated discussion of Ms. Colon's performance evaluation with Mr. Coleman. Id at 274, line 11. Plaintiff similarly initiated discussion of Ms. Colon's performance evaluation with Mr. Kince. Id at 276, line 6. Accord, AJ Transcript at 264, line 21.

On statement of material facts No. 9, pp. 5-6, *ibid* respondents' attorneys stated:

Ms. Colon complained to Captain Chang that plaintiff was making inappropriate inquiries into Ms. Colon's performance evaluations. Id at 965, line 13. Captain Chang tasked Commander Wilder to look into the allegation. Id at 966, line 13. The Coast Guard's civilian personnel experts advised that a letter of reprimand to plaintiff would be appropriate. Id at

966, line 17. Commander Wilder looked into the allegation as directed by Captain Chang. Id at 1287, line 14. The Coast Guard civilian personnel experts advised Commander Wilder that plaintiff's behavior regarding Ms. Colon's performance evaluations was inappropriate. Id at 1325, line 14; 1333, line 13. He determined that a letter of counseling to plaintiff might be appropriate and sought plaintiff's side of the story. Id at 1283, line 7. Commander Wilder showed a letter of counseling to plaintiff but did not intend to issue it to her or to publish it to anyone else. Id at 1284, line 16; 1285, lines 2, 22. Yet somehow plaintiff obtained a copy of that counseling document. Id at 1285, line 4.

On statement No. 19, page 10, *ibid* respondents' attorneys stated:

Plaintiff states that the deletion of the title "Dr." from the Coast Guard computer directory makes plaintiff to "look like a forger and a thief." Clark June 10, 1998 deposition at 159, line 15. Plaintiff did not state that any Coast Guard employee called plaintiff a forger or a thief. Plaintiff did not produce any evidence that any Coast Guard employee – other than plaintiff herself – referred to plaintiff as a forger or a thief. Plaintiff admitted that she initiated insertion of the title "Dr." into her name in the Coast Guard E-mail directory. Id at 162, line 23. In an earlier deposition concerning related administrative complaints, plaintiff admitted that Coast Guard civilian doctors and lawyers did not use or list titles in the DOT phone directory, taken in part from the Coast Guard's computer directory. See generally, Clark deposition May 4, 1998 at 61-66. Mr. Hantzes' title was similarly deleted not later than the following afternoon. See exhibit W-27 to plaintiff's complaint of discrimination dated September 27, 1995, contained in DOT EEO investigation 2-96-051 (E-mail to Harry Hantzes dated June 16, 1995 at 1:11 PM noting that "[t]he "DR" has been removed from your user name in the E-Mail system. This is needed to standardize the mail system

and to conform to the CMDNT (sic) Instruction on E-mail.") Plaintiff knows that Dr. Hantzes' title was deleted shortly after her title was deleted. Clark June 10, 1998 deposition at 163, line 5.

APPENDIX J

On paragraph B.1.4, page 44-48 of my 19-JUL-99's opposition to defendant's motion of 12-APR-99, I argued:

Mr. Coleman testified that I had "stolen" Ms. Colon's performance appraisal and disclosed private confidential information to him without the consent of Ms. Colon. Although he knew it was a lie (as plaintiff proves below), he calculated that it was his word against hers and that his testimony would be believed because plaintiff was a Hispanic and, to him, Hispanics were thieves, and liars, and unquestionably wrong. The evidence starts with Commander Wilder testimony at the 1994 hearing when he brought Mr. Coleman into the picture as follows:

QUESTION BY LIEUTENANT POULIN: Let me show you a letter (document handed to the witness) ... it has been admitted into evidence. It is Complainant's exhibit 20... Do you recognize the letter?

ANSWER (by Commander Wilder): Yes, I do.

QUESTION: Why did you prepare this letter?

ANSWER: Then Commander Chang told me he was the Assistant Division Chief, that Carmen Colon had filed an informal grievance against Dr. Clark because Dr. Clark had been looking in her past performance appraisals, and he said that she had been asking Dennis Coleman about it, and so he told me so I would know what was going on.

I called Dennis Coleman and asked him what had happened, and he said yes, he had gotten a phone call from Dr. Clark, and she had asked him about Carmen Colon's performance during a technical evaluation and wanted to know if her performance was very good – I don't remember the exact – what he thought of her performance, and...

QUESTION: Did you know why Dr. Clark was talking to Dennis Coleman about Carmen Colon's performance?

ANSWER: He didn't say anything. He just said that... (see T. pp. 1280-1287 reproduced in Exhibit 3 to this opposition).

Mr. Dennis Coleman testified that plaintiff improperly disclosed to him, that Ms. Colon had received an outstanding evaluation in the CJE (critical job element) about the technical evaluation board, as follows:

JUDGE: My information is that your testimony will concern a conversation you had with Dr. Clark first about Carmen Colon's performance during something that you worked with Carmen on, and I guess the conversation you had with Commander Chang, Lieutenant Commander Wilder, people from Personnel, or whoever you might have talked to—Carmen Colon herself.

QUESTION BY LIEUTENANT POULIN: Mr. Coleman, do you recall an incident sometime in 1991, where Dr. Clark called you to ask you about Ms. Colon's performance?

ANSWER (by Mr. Coleman): Yes. I'm not exactly sure of the date because it's been some time, but I did receive a phone call one day while I was on vacation at home, and she asked me a few questions... She had become aware that I had temporarily chaired a group to develop a plan for technical evaluation from the Martinsburg OSC contract... And Carmen Colon was a member of that team... I asked why she wanted to know this, and she said that Carmen had been given an outstanding in one of her CJEs as part of a year's effort, and I asked her how did she know this because I didn't think you could get that kind of information, and she said she had her performance evaluation, and I said I don't know how you could get that. I thought that you couldn't get those. And she said there is a way, and I will tell you later (see T. 1346-1350) reproduced in Exhibit 3 of this response.

Plaintiff proved that Mr. Coleman was lying per page 5 of exhibit 49 of plaintiff's response of 29-JAN-96 as follows:

Performance appraisal of Carmen E. Colon from 1 April 1989 to 31 March 1990. Job element 3 of 4, critical, weight 20%. Participate as a member of the technical evaluation team for the OCC recompetition effort. Be involved in statement of work reviews as required for Quality Assurance purposes. Participate in the Source selection plan preparation.

Actual achievement (see enclosure 3). Based on her performance and expertise, Ms. Colon was nominated to participate as a member of the Technical Evaluation Team for the Operational Computer Center (OCC) recompetition effort. She has attended and contributed significantly to all scheduled meetings. She has briefed new members on procedures and policies related to competitive procurement procedures... Rating: Exceptional.

As exhibit 49 shows, Ms. Colon received an "exceptional" rating for the technical evaluation CJE, and not an "outstanding" as Mr. Coleman claimed she said. Mr. Coleman knew his story was a lie but he saw a great opportunity to strike at a no good Hispanic by making plaintiff, a Hispanic, look like a thief.

Plaintiff was damaged in that Mr. Coleman's action gave grounds for attorneys Sullivan, Nagle and Lewis to claim his testimony as evidence in this motion "... plaintiff claims that retaliation motivated the Coast Guard to issue a letter of counseling when she *improperly* (emphasis added) obtained a copy of another employee's performance evaluation" (see defendant's memorandum, page 6, lines 23-26.) Also, "... plaintiff's misconduct in obtaining a copy of Ms. Colon's performance evaluation... " (see defendant's memorandum, page 34, lines 23-24).

That claim by the attorneys, in turn, contributed to unnecessary work by plaintiff in replying to this motion because, if plaintiff did not prove that Mr. Coleman was lying, she could be found in breach of the settlement for a misconduct (see paragraph 7 of the agreement, numeral B,

page 26 above). And, if she proves he lied, still that doesn't prove discrimination: "... This Circuit, however, rejects the view of other courts that *Hicks* will always allow a plaintiff to avoid summary judgment simply by discrediting the employer's explanation for its employment decision" (see defendant's memorandum, page 15, lines 1-4).

All in total, for this motion, plaintiff worked: 2 days x 13 weekends + 2 holidays + 6 regular days off + 1 day of administrative leave granted by defendant + 13 days at a rate of 1 per week calculated at 2 hrs. per day after working hours times 5 days per week + 3 days advanced leave granted by defendant for a total of 51 days. In fact, plaintiff had to request this court for two extensions on the grounds that she had spent all her free time on the response and still had not finished. And, much of her work was spent needlessly on claims such as the one Mr. Coleman originated and attorneys Sullivan, Nagle and Lewis capitalized on.

On paragraph B.1.5, pp. 48-50, of my 19-JUL-99's opposition to defendant's motion of 12-APR-99, I argued:

... Attorneys Sullivan, Nagle and Lewis generalized that, if plaintiff stole Ms. Colon's performance appraisal, she must have also stolen the letter of counseling that CDR Wilder was talking about. In their statement of material facts they claim that it is undisputed that "CDR wilder showed a letter of counseling to plaintiff but did not intend to issue it to her or to publish it to anyone else. Yet somehow plaintiff obtained a copy of that counseling document" (see defendant's statement # 9, page 6, lines 13-17).

Like Mr. Coleman, the attorneys thought that plaintiff was a no good Hispanic. This is because the attorneys knew that plaintiff had not stolen Ms. Colon's performance evaluation since exhibit 31 of IR 91-62 (see the list on exhibit 22 of this response) establishes Ms. Colon's performance evaluation as part of it, and exhibit 5 of IR 91-62 (reproduced on exhibit 22 of this response) establishes that plaintiff was legitimately entitled to a copy of the report. The attorneys had a copy of

that report because they mentioned it in this motion as follows: "Panel member Tom Dalton Clark stated that it was the unanimous opinion of the panel, that Ms. Colon was the best candidate; "[s]he received the highest marks overall." DOT EEO investigation 91-062 at Exhibit 16" (defendant's memorandum, footnote 8, page 31.)

EXHIBIT 22

Investigative Report No. 91-62

On page 2:

IV. DESCRIPTION OF EXHIBITS

EXHIBIT 5

Notice of Receipt of Complaint of Discrimination, dated 14 JAN 91, 3 pp.

On page 4:

EXHIBIT 31

Selectee's Annual Performance Appraisals Covering 19 JUN 88 through 31 MAR 89 and 1 APR 89 through 31 MAR 90, 12 pp.

EXHIBIT 5 to IR 91-62

On page 1:

JAN 14 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Complaint No. 91-62

Ms. Clara Clark
P.O. Box 44553
Washington, D. C. 20026

Dear Ms. Clark:

We acknowledge receipt of your complaint of discrimination in the Departmental office of Civil Rights and, with this notice, provide you with your rights as a complainant. PLEASE READ THIS NOTICE CAREFULLY SO THAT YOU MAY FULLY UNDERSTAND YOUR RIGHTS. Should you have questions or difficulty in clearly understanding these instructions, please contact an EEO Officer for assistance.

Your complaint will be assigned for investigation. At the conclusion of the investigation, and when the preparation of an Investigative Report is completed, one copy of the report will be forwarded to you and one will be forwarded to the Agency with appropriate instructions. Your copy will be for your permanent possession and need not be returned...

On page 5:

/s/ Robert J. Coates
(SEAL)
ROBERT J COATES
Chief,
Internal Programs Division

APPENDIX K

On paragraph B.3.2, p. 86, of my 19-JUL-99's opposition to defendant's motion of 12-APR-99, I argued:

On February, 1992, while at the office for a few hours to turn in some travel claims from AFCAC, plaintiff received a letter of reprimand from CDR Wilder, dated 15-JAN-92, that said:

I have information that you have been asking others about the performance of another employee within this Division.

Your job does not require you to monitor the work of others within this Division. You should not be collecting information on another's work performance. By doing so, you create unnecessary tension and decrease the effectiveness of others within this Division.

Your behavior was inappropriate. Please stop.

Copy to Commander Chang and to Personnel (G-PC-5). (See exhibit 60 of plaintiff's response of 29-JAN-96).

On paragraph B.3.2.1.7, pp. 91-92, of my 19-JUL-99's opposition to defendant's motion of 12-APR-99, I argued:

Per defendant's memorandum, page 34, lines 23-25, defendant articulated that plaintiff stole the letter of reprimand and, therefore, the agency was justified in issuing her the letter of reprimand. However, the letter is addressed to plaintiff making it her property and, since by definition, stealing is taking or appropriating of another's property, it follows that a person cannot steal from himself or herself.

APPENDIX L

On statements of material facts Nos. 12-16, pp. 5-6, of my motion of 25-FEB-97 to amend the pleadings, I stated:

Ms. Schremp's retaliation in this amendment.

12. ... On June 12, 1995, plaintiff complained to Ms. Schremp's Division that she was able to log in the computer without a password and Ms. Schremp replied that Petty Officer Pat Ender was investigating the security incident (see Exhibit 5.)

13. Ms. Schremp's action was to accuse plaintiff, through her supervisor Commander Keith Grant, that she had her title in the computer without authorization. Plaintiff looked desperately for the evidence that she was authorized to have her title in the computer, otherwise she could lose her job for tampering with the computer.

Injury.

14. Although plaintiff found the authorization (see Exhibit 6) this incident caused plaintiff tremendous anxiety and she went home sick with nausea and reported sick the next day, June 15, 1995.

Ms. Schremp's reasons for her action.

15. On June 21, 1995, Ms. Schremp replied that the reason for the security violation was a defective computer that does not restore passwords after backup (see Exhibit 10).

Commander Bair's incident of sex discrimination.

16. In spite of the authorization, Commander Scott Bair, Ms. Schremp's supervisor, deleted plaintiff's title of doctor from the computer (see Exhibit 7.)

On page 8:

23. On paragraph 4, page 1, exhibit 13, Lieutenant Butler offers a copy of the Commandant Instruction regarding the

standards for names in the computer. The copy of the instruction (CI 5270.1C) is shown in Exhibit 14.

24. Exhibit 15 shows that CI 5270.1C was not in effect at the time of this incident. The one in effect was CI 5270.1B.

On the memorandum of points and authorities, p. 5, paragraph c, of my 25-FEB-97 motion to amend the pleadings, I stated:

c. Ms. Schremp engaged in conduct having an adverse impact on the plaintiff as follows:

Ms. Schremp accused plaintiff, through Commander Grant (plaintiff's supervisor), of making unauthorized changes to the computer to make it accept her title of doctor...

On the memorandum of points and authorities, p. 6, of my 25-FEB-97 motion to amend the pleadings, I stated:

Ms. Schremp articulates a response: Since plaintiff produced evidence that her title in the computer was authorized by Captain Chiswell (see Exhibit 6) Ms. Schremp's accusation that plaintiff made unauthorized changes to the computer, so as not to require a password, failed...

Exhibit 6 of plaintiff's motion of 25-FEB-97

W-3
Date: Jul 26, 1993 12:02 PM
Message ID: G-M060039144
From: Clara Clark
To: Mark Polanskas
Copies: Harry Hantzes
Attach:
Subject: E-Mail Names
In reply to TISCO-003359
In reply to G-M060034544
In reply to G-M060037633

1. The message forwarded below is interim authorization to have my E-mail name to include my title of DR.

2. Please make the change.

3. Thank you.

Dr. Clara Clark

***** FORWARDED MESSAGE *****

Date: Jul 26, 1993 11:31 AM
Message ID: G-T07-042436
From: TTM/G-T07
To: C.CLARK/G-M06
Copies:
Attach:
Subject: E-Mail Names
In reply to TISCO-003359
In reply to G-M060034544
In reply to G-M060037633

Mr. Smallfield & I agree that if you want your email user name to include DR, that is appropriate and you can have your mail center administrator change your files. The next revision of the email management instruction for naming convention still will not be including this option. Cite this email as interim authorization.

CAPT CHISWELL

EXHIBIT 6

Page 1 of 1

Exhibit 15 of plaintiff's motion of 25-FEB-97

W-36
US DEPARTMENT (Coast Guard's symbol)
OF TRANSPORTATION
UNITED STATES
COAST GUARD

DIRECTIVES,
PUBLICATIONS
AND REPORTS
INDEX (DPRI)

COMDTNOTE 5600 Exhibit 15
JANUARY 1995 Page 1 of 2

Excerpt of page 2 of exhibit 15
W-37
CHAPTER 2 – DIRECTIVES AND PUBLICATIONS
LISTED NUMERICALLY

5270.1B 03/30/90 Sponsor G-TTM
Stockpoint: DOT
MANAGEMENT OF ELECTRONIC MAIL

EXHIBIT 15
Page 2 of 2

APPENDIX M

On pp. 10-11, statement 20, of defendant's statement of material facts of 12-APR-99 in support of their motion to dismiss in part, or in the alternative motion for summary judgment, defendants stated:

Plaintiff alleged that Lieutenant Butler discriminated against plaintiff and made her to look like a forger and a thief, in failing to explain why he did not use her title of doctor, which had been deleted from the Coast Guard's E-Mail directory in accordance with the Commandant Instruction governing E-Mail user names, when copying plaintiff on an e-mail about a different colleague's excellent performance. Amended complaint at ¶ 68-G; Clark June 10, 1998 deposition at 159, line 15; 161, line 24. Plaintiff admits that at the time that Lieutenant Butler did not use plaintiff's title in addressing E-mail to her, that the Coast Guard instruction governing E-mail titles did not authorize the use of plaintiff's title. *Id.* At 166, line 2; 170, line 13; *see* also Commandant Instruction 5270.1B

APPENDIX N

On pp. 1-2, of defendant's motion to dismiss in part, or in the alternative motion for summary judgment of 12-APR-99, defendants stated:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 95-1683

DR. CLARA CLARK,

Plaintiff,

v.

RODNEY SLATER, in his official capacity as the Secretary, United States Department of Transportation,

Defendants.

Filed JAN 14 2000 (seal)

Judge Emmet G. Sullivan

MOTION TO DISMISS IN PART, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The defendant, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss in part the amended complaint. In the alternative, defendant moves for summary judgment, pursuant to Fed. R. Civ. P. 56, on the grounds that there is no genuine issue of material fact in this matter, and defendant is entitled to judgment as a matter of law.

In support of this Motion, the Court is respectfully referred to the accompanying defendant's Statement of Material Facts as to Which There is No Genuine Issue, the supporting Memorandum, and the attached declarations, documents, and testimony. A proposed order is also submitted .[1]

Respectfully submitted,

/s/ Wilma A. Lewis
WILMA A. LEWIS, DC Bar No. 358637
United States Attorney

/s/ Mark E. Nagle
MARK E. NAGLE, DC Bar No. 416364
Assistant United States Attorney

---

[1] Plaintiff is advised that the motion being made by defendant is a motion for summary judgment. Plaintiff should take notice that any factual assertions contained in the declaration attached to defendant's memorandum of points and authorities in support of the motion will be accepted by the Court as true unless plaintiff submits her own declaration or other documentary evidence contradicting the assertions made therein. See *Neal v. Kelly*, 963 F.2d 453 (D.C. Cir. 1992), Local Rule 108, and Fed. R. Civ. P. 56(e), which provides as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

/s/ Diane Sullivan
DIANE SULLIVAN, DC Bar No. 12765
Assistant United States Attorney
Judiciary Center, Room 10-810
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-7205

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss, or In the Alternative for Summary Judgment; Statement of Material Facts not in Dispute, and Memorandum in Support of Defendant's Motion to Dismiss, or In the Alternative for Summary was mailed postage prepaid to Clara Clark, P.O. Box 44553, Washington, DC 20026-4553, this 12th day of April, 1999.

/s/ Diane M. Sullivan
DIANE M. SULLIVAN, DC Bar No. 12765
Assistant United States Attorney
Judiciary Center, Room 10-810
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-7205

APPENDIX O

On page 37 of defendant's motion to dismiss in part, or in the alternative motion for summary judgment of 12-APR-99, defendants stated:

On pp. 31-37 of plaintiff's opposition of 19-JUL-99 to defendant's motion of 12-APR-99, plaintiff stated:

... Although plaintiff's native language was Spanish and her thoughts and values were those of the Hispanic culture from which her forbearers came, at the time of the incident with Ms. Bullock plaintiff had acquired technical proficiency in English: she had been winner in English speech contests against native English speakers while earning her Toastmasters certificates; she received award for best technical publication over the publications of native English writers; and she was working towards a doctorate in a computer related field.

Through her experience in learning English, plaintiff had encountered lots of ambiguity due to the fact that her cultural values expressed through her native Spanish did not translate on a "one-to-one" basis, as computer technical people say, meaning that they do not march word for word. The more proficient she became, the finer the degree of ambiguity and the stronger the accusations from people complaining that she said things, which she knew, she did not mean.

People who work with Hispanics know this. For example, at the Gordon School of the District of Columbia, where plaintiff taught computer classes (see exhibit 25, this response) and English native speakers taught English to foreign students (approximately 90% Hispanics), it was common for the orientation group to give a sympathy card to their teacher for Christmas. This is because in Spanish the word "simpatico" means "I like you" and the words "Merry Christmas" did not look anything like "Feliz Navidad".

One of the things that plaintiff began to pursue, when she realized this problem, was to try to teach Spanish to native English speakers who wanted to learn, in an effort to reduce the clashing of two cultures (Hispanic and English), due to misunderstandings, simply because things that mean something in one language mean, in many instances, just the opposite in the other language, although the spelling seems very similar. One example is the word "compromise" which in English can mean "exposure, as of one's reputation, to danger, suspicion or disrepute" while in Spanish "compromiso" means "commitment" as in a pledge or promise to do something. Plaintiff knows this because her American-native-English-speaker husband, at one time, opened his eyes widely when her Hispanic relatives, with difficulty, referred to being "compromised" to send him some videotapes. And the list of examples goes on and on... Ultimately, plaintiff thought of writing her doctoral dissertation on this subject. Evidence of this is as follows:

TO: V.L. Whittington, Chief Training & Emp. Dev. Sec.
FROM: C.I. Clark, Computer Specialist, G-MP-4. Ph 70384.
SUBJ: In-house classes in conversational Spanish.
DATE: March 20, 1989

As discussed during our meeting in your office on March 10, 1989, I would appreciate to be given the opportunity of conducting classes in Spanish at the Coast Guard Headquarters...

Each session will be based on a description of an every-day scene such as ordering food in a restaurant...

I expect no monetary compensation for this activity. My gain in doing so will consist of the knowledge that I would acquire of the process of communication and language. I plan to apply this knowledge in writing my dissertation on the subject of artificial intelligence and language. Finally, I would like to say that it would be nice to obtain approval to

my request but, if denied, my research will not be adversely affected.

... Per exhibit 31 to this response, in 1992, plaintiff did write her dissertation on making the computer understand Spanish, and the scene she used was a restaurant scene.

In her deposition plaintiff testified that, as Hispanic Employment Program Manager (HEPM), she would have liked to teach Spanish to English-native speakers, who were employees of defendant, in an effort to help "remove the barriers toward the employment of Hispanics" per her duty as HEPM. Plaintiff's testimony was s follows:

A: ... I kept reading that part that said that one of my duties was going to remove barriers toward the employment of Hispanics.

Q: Okay.

A: And I felt, well, I know a way to remove a barrier. I can teach Spanish to people at the Coast Guard Headquarters, and then the Hispanic doesn't need to know that much English because I am matching him with the supervisor whom I know knows some Spanish, and at least it helps (see deposition at page 12.)

Although Ms. Bullock testified that the Spanish-teaching idea came from her, the evidence shows differently as the memorandum to Ms. Whittington was dated 20-MAR-89 and Ms. Bullock's testified that on April, 1989, she suggested that plaintiff go and see Ms. Whittington with the offer to teach Spanish. The evidence of this is in the motion that the attorneys made to dismiss complainant's claim on 15-NOV-93 (see T. Complainant's exhibit 25, attachment 5,) where Ms. Bullock testified:

> 3. ... On or about April, 1989, the then HEPM, Frank Boada, desired to relinquish his role as HEPM. Mr. Boada suggested that Ms. Clark (white, Hispanic female) might replace him as HEPM. A meeting was held between Mr. Boada, Ms. Clark, and myself in my office. Mr. Boada and I described the duties and

responsibilities of the HEPM. During this meeting, Ms. Clark said little.

4. Within a week of the above meeting, Ms. Clark came to my office. Ms. Clark told me of a project she wished to institute as HEPM. This project would involve the teaching of Spanish to both Federal employees and individuals outside the government. I told Ms. Clark that this project was not within the scope of the Hispanic employment Program (HEP). I suggested to Ms. Clark that she consult with Ms. Verdell Whittington, the Chief, Employee Training and Development Section, USCG Headquarters Civilian Personnel Branch, as Ms. Whittington would be able to determine whether the Civilian Personnel Branch could institute such a program. Ms. Whittington, after discussing the matter with Ms. Clark, informed me that Ms. Clark's project would not be within the authorized scope of training, i.e., to meet the mission essential needs of civilian employees.

5. Shortly after this second meeting between Ms. Clark and myself I received a strongly worded memorandum from Ms. Clark, sent via her first line supervisor. I responded with a memorandum to Ms. Clark, also sent via Ms. Clark's first line supervisor. I do not clearly recall the contents of either Ms. Clark's memorandum of my memorandum given the lapse of time since these events and because all documents were to be destroyed as a result of the settlement agreement...

6. After this exchange of memoranda, Ms. Clark contacted an EEO counselor, Mr. Benjamin Bandy. I discussed the matter with Mr. Bandy. Apparently, Ms. Clark claimed that my informing her that the project to teach Spanish was not within the scope...

Ms. Bullock, who had experience working with Hispanics as a civil rights officer, knew of this national

origin "weakness", if you will, of plaintiff. That is the reason why she spent long time helping plaintiff with her speech (see paragraph 5 of Ms. Bullock's 30-MAR-89 memorandum to plaintiff...)

APPENDIX P

On pp. 18-22 of plaintiff's opposition of 19-JUL-99 to defendant's motion of 12-APR-99, plaintiff stated:

SUBJECT: Declining Offer of Collateral duty.
FROM: Clara Clark, Computer Specialist.
TO: Norma Bullock, Headquarters Civil Rights Officer
VIA: Chief, Marine Safety Information Systems Branch (followed by CDR Fels' initials and handwritten date of 3-22-89.)

1. the purpose of this memorandum is to follow-up on our meeting of March 13 at your office. At the meeting, I declined your offer of collateral duty as HEPM because of the incompatibility of my goals and those of the program. I explained that I work on cultural and ethnic activities with Hispanics who are foreign students at local universities and, unfortunately, these persons are not eligible for employment with the Coast Guard.

2. I would like to comment on your offer for the benefit of the Hispanic Program at Coast Guard Headquarters. After reading your offer, I perceived it as inflexible and somewhat penalizing. For example, according to the job element that was going to be added to my position description, I would have been rated on how well I would write a plan to meet the overall objectives of the Hispanic Employment Program, and on timeliness in meeting completion dates. To me, these inflexible requirements seemed fair for a person with experience concerning EEO programs and contrasted with the expectations I had: to be trained on the job. Consequently, when no training was mentioned and no words of encouragement were offered, I did not want to take the chance of receiving a bad rating and spoiling an otherwise brilliant record. In addition, the offer

required of me to work at least 10% of the time for the Hispanic program. This requirement would have denied me the opportunity to excel because any extra effort beyond the 10% would have been considered as regular duty. To add to my disappointment, the offer was made by your assistant without giving me the opportunity to negotiate with you, as my supervisor-to-be, the terms of the contract.

3. I hope that my candidness is received positively, as constructive criticism, for the benefit of the Hispanic Employment Program at the Coast Guard Headquarters. I wish you the best in the search for a Hispanic Employment Manager and offer my support in this endeavor.

Clara Clark

On 30-MAR-89, Ms. Bullock replied on a letterhead memorandum identified as No. 2600A (see pp. 4-6, exhibit 13 of plaintiff's response of 29-JAN-96.) It said:

SUBJECT: Declining Offer of Collateral Duty.
FROM: Headquarters Civil Rights Officer
TO: Clara Clark, Computer Specialist
VIA: Chief, Marine Safety Information Systems Branch
REF: (a) your memo dtd 22 Mar 89

1. This memorandum is a response to reference (a).

2. I sincerely regret that you have declined to accept the collateral-duty Hispanic Employment Program Manager (HEPM) position. While I believe that your declination is a result of your perception of an incompatibility of goals, I am extremely disturbed about the comments you made and wish to address those so that your declination may be viewed in a more positive and rational light.

3. The job element for the HEPM was developed in conjunction with the previous HEP Manager and was determined to be the minimal threshold achievable. In fact, the previous HEP Manager, who was also a GM-13 Computer Specialist, wanted the job element to be critical as he saw the HEP duties as a vital part of this total work effort. However, as a collateral duty, the job element does not warrant the designation of "critical". It consists essentially of developing a work plan for implementing program responsibilities – a task that a GM-13 should not find overwhelmingly challenging. It hardly lends itself to the potential for a rating that would place a collateral-duty HEPM in jeopardy at the evaluation period.

4. When you and I met on 13 March 1989, we discussed your perception that the job element was "inflexible", however, I thought that you clearly understood that, indeed, there is a great deal of flexibility in it. Also, both Ms. Tami Gray of my staff and I assured you that training would be provided at G-CCS-1's expense as it has been for each of your predecessors. In fact, you were scheduled for an OPM course on managing the HEP but the scheduling conflicted with a course you were previously scheduled to attend. As a "second choice," we determined that you could attend the departmental Office of Civil Rights' HEP conference at G-CCS-1's expense.

5. Regarding your assertion that you received "... no words of encouragement," I am dismayed and disappointed. Every HEP Manager who has held the collateral-duty since my tenure will attest to the strong support we have provided them in carrying out the program – a fact we shared with you during the 13 March 1989 meeting. Indeed, you personally benefited from that level of support when I devoted

approximately one hour to you to review a speech you had written for presentation at the Coast Guard Headquarters' 1988 Hispanic Employment Program kickoff activity. I took your speech and completely re-wrote it (another 1-2 hours of work), gave you feedback regarding the changes and explained the reasons why they had been made. As a result, you probably delivered one of the most powerful and well-received speeches of your career. I encouraged you prior to delivering the speech by coaching you on how to place the emphasis when giving the message and by constantly letting you know that "... you could do it," to build your self-confidence. Afterwards, you expressed your thanks, verbally, to me over and over again. Certainly, this kind of support could not have been construed by you to be a one-time effort that somehow would not continue into the future once you became the HEP manager.

6. As Ms. Gray and I explained to you separately, the 10% allocation of time that it is to be devoted to the collateral duty assignment has been negotiated downward to 20% to make it more appealing and marketable from supervisors from whom we get our support. In agreeing upon a 10% time factor, their employees will be devoting 90% rather than 80% of their work time to their primary duties. As a matter of fact the MOU between supervisors, special emphasis managers, and I seek to clarify this arrangement so that no employee is placed in jeopardy regarding the performance of their regularly-assigned jobs. The two previous HEP managers did spend their own time, away from duty, to promote the program's goals, nonetheless. For their total efforts, each was nominated by me and received the coveted Office of Personnel Management (OPM's) Federal Hispanic Employment Program Manager's Achievement

award. I somehow believe, judging from your comments, that you do not understand that the HEP manager's duties are unrelated to your work as a computer specialist and, therefore, never would have been considered "regular duty."

7. My staff represents me in meetings with managers and employees to carry out the special emphasis program under my span of control. This is normal and natural system and process within a bureaucracy. Therefore, it was entirely proper that you were interviewed by a member of my staff who explained the duties of the position to you. You were not prohibited from discussing any aspects of the job directly with me. In fact, we scheduled such a meeting with you prior to the 13 March 1989 meeting. You failed to appear and did not call to cancel it.

8. You might recall that when you met with both Ms. Gray and I, the importance of the HEPM's assignment was highlighted and I focused upon the opportunity to develop "management skills" with personnel who often, because of their highly technical positions, do not have the opportunity to develop. Work plan preparation is one of the manager's tools. "People skills" are another important set of tools that you would have acquired and developed through interactions with Headquarters personnel in carrying out your duties.

9. Since 1983, when I came to the Coast Guard, the Headquarters Civil Rights Staff has managed a highly effective Hispanic Employment Program. We believe that we have grown substantially in that time. We continue to grow and to improve upon program operations, as we seek to achieve excellence in every aspect of our work. While we welcome new ideas and suggestions for HEP program improvements, I do not find any new ideas or anything positive in your

assessment of the HEP at Coast Guard Headquarters. Perhaps, when you have been here longer, you may, through observation and assessment, be able to offer new insights that would be wholeheartedly welcomed.

10. Regrettably, I found your comments to be an indication of miscommunication, misunderstanding and a lack of candor rather than finding them to be well-intentioned, positive feedback meant to bring about program improvements. As such, I was saddened to read in memorandum format that despite our best efforts o express our commitment to nurturing you in the position of Headquarters HEPM that you failed to grasp that meaning and a mutual understanding of what transpired between us was not achieved. I know that you are aware of my background as a human resources manager (MPA – 1986, The American University), and that I pride myself, personally, on using the skills acquired at the graduate level to "coach" subordinates and provide the stimuli they need to help them carry out their duties and responsibilities as efficiently and effectively as possible. Therefore, I regret that I will not be able to offer you the kind of support in the area of special emphasis program management.

(signed)

N. L. Bullock

APPENDIX Q

Excerpts of transcript of the 1994 hearing at page 503-506, reproduced in Exhibit 3 of plaintiff's opposition of 19-JUL-99:

JUDGE COLBY: Let the record show that we had a lengthy recess while some procedural matters were being dealt with. I will summarize for the record what it was being dealt with.

The agency's representatives provided certain materials to the witnesses in this consolidated hearing in their preparation as witnesses in this consolidated hearing in their preparation as witnesses and provided cover letters with certain information. The complainant's representative determined through cross-examination that such materials were provided to these witnesses. Incidentally, the witnesses that this was provided to were witnesses who are responsible management – or who have been designated as responsible management officials by Dr. Clark, the complainant.

Complainant's representative determined that such materials had been provided to these witnesses and requested to be provided with whatever it was that was provided to the responsible management official witnesses. The agency's representatives asserted attorneys' work product privilege with regard to these materials.

While we were off the record, I made a determination that the attorneys' work product privilege had been waived with regard to the information that was provided to the responsible management official witnesses, and therefore I directed the agency representatives to make available to complainant's attorney the documents that had been provided to these witnesses and the transmittal letters through which they were provided.

Ms. Weiss, would like now to make a statement for the record.

MS. WEISS: I have reviewed the material provided to me and have determined that, in fact, counsel has tainted the witnesses via the witnesses who received this, basically turning them against Dr. Clark.

MR. PESSIN: First of all, the documents that were provided to the responsible management officials, if they had any impact at all, simply refreshed the testimony of these responsible management officials...

LT POULIN: I would add that these documents were provided in preparation for the witnesses' testimony, and I find it hard to believe that we could not discuss the issues, share our points of view with these people in preparation for their testimony.

We have a duty to figure out what's going on in this case. This is a fact finding process. We needed to verify discovery, our responses to discovery. We needed to check the deposition for conflicting facts, and these people, as responsible management officials, needed to see that in order to respond on the agency's behalf and on their own behalf.

At page 509:

MS. WEISS: What I'm saying in response is you decided your purpose was to refresh their memories. There in fact is no indication that they needed refreshing. What you in fact were giving them was the Coast Guard's position, which you wanted them to attest to, telling them it was a very important case for you to win.

This whole thing is nothing but a smear on Dr. Clark. Had these people not received this, their testimony might be a lot different than when they come in here realizing that Dr. Clark is their enemy. And I don't believe that it/s refreshing anybody's recollection...

On page 40 of plaintiff's opposition of 19-JUL-99:

SUBJECT: EEOC hearing: Clara Clark
DATE:: 23-NOV-93
REPLY TO: G-LGL
ATTN: Lt Poulin
TO: Capt Cope, CDR Balch, CDR Davin, CDR Wilder and CDR Fels.

1. Enclosed is a copy of the recent deposition of Dr. Clara Clark. I think it would be helpful for the prospective Agency witnesses to read her responses to direct questions concerning each of the allegations of discrimination.

2. ... This is an important case for the Coast Guard and all the alleged discriminating officials involved.

/s/ S. D. Poulin

Encl: (1) Copy of the deposition.

(T. Agency's Exhibit 24.)